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# Merging Roles: Mass Tort Lawyers as Agents and Trustees

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# Merging Roles: Mass Tort Lawyers as Agents and Trustees

Charles Silver\*

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## I. INTRODUCTION

Academic commentators recognize that state bar ethics rules cannot regulate lawyers' responsibilities in class actions as they do in other contexts.<sup>1</sup> This conclusion holds partly because class actions are subject to due process constraints.<sup>2</sup> Due process requires conflict minimization, and state bar rules sometimes create conflicts needlessly. Judges must ignore

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1. Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1829-31 (2000) (stating that the state bar rules "were not designed with class litigation in mind . . . and are poorly suited to the special problems that class actions present"); see also John C. Coffee, Jr., Kutak Symposium, *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 331, 340 (2000) (observing that "the usual rules of legal ethics simply cannot apply to the class action context.").

2. See Silver, *supra* note 1, at 1827.

state bar rules when this occurs.<sup>3</sup> By doing otherwise, they would saddle absent plaintiffs with inadequate representation.<sup>4</sup>

The conclusion that traditional approaches to lawyer regulation fail in class actions also reflects the reality that lawyers and class members do not relate to each other as lawyers and clients typically do. As Professor John C. Coffee, Jr. states:

Courts have been repeatedly saying . . . that the usual rules of legal ethics simply cannot apply to the class-action context. . . . The key reason . . . is that the relationship between attorney and client is totally different in the class-action setting.

All traditional legal ethics is founded upon an idea of the attorney as agent and once you are an agent, you have an established body of law, the Restatement of Agency, that tells you fidelity, loyalty, everything you would expect of a fiduciary applies. . . .

However, in the class action, the plaintiff's attorney is not simply an agent; the attorney is also the financier of the class action. The attorney puts up the litigation expenses and[,] in the typical class action, that amounts to as much as several million dollars. What's more, the attorney is not just a creditor; the attorney is a joint-venturer because the attorney's economic return will likely be . . . thirty percent of the total settlement before expenses. . . . We have a world in which the attorney is simultaneously creditor, joint-venturer, and agent of the class, and that means the rules of legal ethics, which assume that the attorney is exclusively an agent, are really quite different. And, to take these multiple relationships and say that the rules of princip[al] and agent determine everything, is really only possible by stuffing the square peg into the round hole. You can stuff square pegs into round holes, but you do it with brute force and not with elegance.<sup>5</sup>

Coffee's argument draws on the economic or structural features of class actions.<sup>6</sup> Consequently, it applies with equal force to other representations that differ from traditional attorney-client relationships in the identified ways.<sup>7</sup> Mass tort representations, including multi-plaintiff asbestos lawsuits,

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3. *Id.* at 1820, 1832 ("The Due Process Clause requires [judges] to minimize conflicts between absent claimants and their representatives.").

4. *Id.* For example, even though contingent percentage compensation arrangements minimize conflicts between class members and their attorneys, judges often refuse to use them on the ground that they yield effective hourly rates higher than state bar rules allow. *Id.* Judges thus build avoidable conflicts into class actions, denying class members due process of law.

5. Coffee, *supra* note 1, at 340-341.

6. *Id.*

7. See, e.g., Charles Silver & Lynn A. Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998) (arguing that consensual

fit Coffee's description. The plaintiffs' attorneys provide crucial financing.<sup>8</sup> Therefore, like class action lawyers, they are claimants' creditors. They earn contingent fees in the range of thirty to forty percent. Therefore, like class action lawyers, they are joint venturers with claimants. And they are agents with fiduciary duties. Therefore, like class action lawyers, they owe claimants loyalty. Coffee says it is "stuffing the square peg into the round hole" to use the rules of agency to handle all issues when these diverse relationships combine. If this is true for class action lawyers, it is true for mass tort lawyers as well.<sup>9</sup>

This article will argue that mass tort lawyers occupy two roles with differing and somewhat conflicting responsibilities. Sometimes, they are agents who must benefit their clients and operate subject to their clients' control. Other times, they are trustees and must figure out what is reasonable for their charges. The latter assignment entails a degree of paternalism and a degree of freedom to act disloyally, both of which are foreign to agency. Subjecting mass tort lawyers to agency rules exclusively obscures and distorts the latter role, which lawyers must play if group representations are to succeed.

Forcing square pegs into round holes also creates an intolerable situation in which a lawyer who merely wishes to do what is right when settling a mass tort representation can find no clear path under the rules.<sup>10</sup> I often receive requests for assistance from lawyers who, being on the brink of negotiating or having already negotiated enormous settlements, see the process of finalizing deals as an ethical minefield. This is not as it should be. The default rules of agency and professional responsibility should create clear signposts that lawyers can follow when settling multiple-client representations and that, if followed, insulate lawyers from liability.

This article will argue for a richer normative account of mass tort lawyering in the following way. Part II will show that the project of maximizing claim values can be rife with conflicts. Because this project is usually thought to be a harmonious one that agency law and state bar rules

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group lawsuits can serve as models for class action because "[f]rom an economic perspective, litigation groups in both realms look much the same except for their manner of creation.").

8. Coffee, *supra* note 1, at 341 (stating that, in class actions, "the attorney is also the financier" by "put[ting] up the litigation expenses").

9. By starting with class actions and ending with consensual group lawsuits, I reverse my usual manner of proceeding. See Charles Silver & Lynn A. Baker, *supra* note 7 (arguing that consensual group lawsuits can serve as models for class actions). I do so simply because Professor Coffee's subject was the class action. Generally, I think consensual litigation groups function better than class actions because they rely on contractual private orderings rather than judicial regulation. Howard Erichson takes the opposite tack, writing that "it makes sense to take some of the strongest ideas from the class action literature and case law and examine whether those ideas can sensibly be applied to address some of these problems in non-class collective representation." Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 7 (forthcoming 2003).

10. Coffee, *supra* note 1, at 341.

permit lawyers to undertake, one must conclude that these bodies of law have considerable tolerance for conflicts built in. Part III will focus on the project of allocating recoveries. It will argue that although this project entails unavoidable conflicts, plaintiffs' lawyers make valuable contributions to it, akin to the contributions trustees make by allocating assets among beneficiaries impartially and reasonably. In practical effect, the point of requiring conflict waivers is to allow lawyers to act as trustees when designing allocation plans. Finally, Part IV will argue that misplaced attachment to agency and state bar rules prevents clients from regulating mass tort representations in ways that further their interests. Default rules of agency and ethics are supposed to help clients, not harm them. Clients should therefore be free to deviate from these rules when they want. In particular, they should be free to create fiduciary relationships that cast lawyers in hybrid roles that allow lawyers to make inter-client trade offs.

## II. MAXIMIZATION CONFLICTS

A mass tort representation requires a lawyer to perform two tasks: maximize the value of a block of claims; and allocate the recovery among the claimants or, at least, recommend an allocation subject to client approval. The first task is commonly thought to be a harmonious undertaking; the second, to be fraught with conflicts.

Value maximization seems conflict-free. Contractual contingent fee arrangements motivate plaintiffs' attorneys to prefer larger recoveries to smaller ones, and increasing the size of the pie has the potential to make everyone better off. A larger pie facilitates Paretian improvements, i.e., moves from State One to State Two that help some clients (and possibly all clients) without harming any.<sup>11</sup> This is an "in principle" point. Given any possible allocation of the expected recovery for a group as a starting point (State One), a larger recovery enables one to achieve a different allocation (State Two) in which at least one client is better off and no client is worse off. Increasing the recovery therefore seems unambiguously to be a step a lawyer can take without being disloyal to anyone.

I do not deny that plaintiffs' lawyers should seek to maximize recoveries for claimant groups. This is the goal clients typically want lawyers to seek *ex ante* and which they use level contingent percentage fee agreements to encourage lawyers to pursue.<sup>12</sup> However, the simple and harmonious account of claim maximization just presented is unduly sanguine. It requires an important factual assumption that is often incorrect, and it hides conflicts that can arise when the transition from State One to State Two requires a series of moves.

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11. For an excellent recent summary of Paretianism and its strengths and weaknesses, see Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1515-20 (forthcoming 2003) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002)).

12. This point is explained more fully in Part III, *infra*.

*A. Conflicts Arising When Maximization and Allocation are Connected*

The factual assumption required by the simple account is that strategies for maximizing claim values do not prejudice possible allocations of recovered funds. To see this, consider two possibilities. Maximization Strategy 1 yields an expected recovery of \$300 that must be divided among Clients A, B, and C equally, so that each receives \$100. Maximization Strategy Two yields a larger expected recovery, \$330, but it must be divided \$90 to A, \$90 to B, and \$150 to C. Strategy Two increases the recovery for the group (and a uniform contingent fee arrangement would encourage a lawyer to select Strategy Two for this reason), but it also disadvantages Clients A and B. Strategy One serves them better by giving them larger shares of a smaller gross recovery.

In this example, the move from Strategy One to Strategy Two is a potential Pareto improvement known as a Kaldor-Hicks improvement, but not an actual Pareto improvement.<sup>13</sup> To make Strategy Two Pareto superior to Strategy One, one would have to take an amount between \$20 and \$50 from C and split it between A and B, with each receiving at least \$10. One would then have an allocation in which no client receives less than \$100 (the expected payoff for each client generated by Strategy One) and at least one client receives more.

Because it is easy to move money, the difference between an actual Pareto improvement and a potential Pareto improvement may seem to be of academic interest. A plaintiffs' attorney can select Strategy Two, increase the size of the pie, and reallocate the proceeds so that no client suffers.<sup>14</sup> Yet, the assumption that one can maximize now and assign shares later need not be true. Maximization and allocation can be linked in ways that allow Kaldor-Hicks improvements but not Pareto-superior moves.

Sometimes money comes with strings. Instead of settling for a lump sum that can be allocated freely, a defendant may offer individualized payments. In the example just given, the "\$100 each" allocation may be the defendant's "out of the box" settlement offer, and the "\$90, \$90, \$150" allocation may be an expected second offer made after both sides have taken discovery and more carefully assessed the merits. If the defendant will not permit a reallocation (e.g., because it faces thousands of lawsuits and does not want a reputation for overpaying on weak claims) by pursuing Strategy Two, a plaintiff's attorney would maximize the value of the group of claims but would also make two clients worse off than they would have been under Strategy One.

Jury verdicts are also sources of strings. Because jury awards liquidate individual claims, maximization and allocation are connected when

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13. Coleman, *supra* note 11, at 1517-19.

14. Reallocation may raise loyalty issues. See *infra*, Part III.

maximization involves going to trial. A lawyer cannot simply take part of a jury's award to Client A and give it to Client B. This feature of jury awards may even account for a defendant's decision to shift from the first allocation plan to the second when offering settlement dollars, on the usual theory that settlement offers reflect outcomes expected at trial.

Plaintiffs' attorneys have tried many asbestos cases, and some trials have yielded spectacular verdicts. Plaintiffs who might have received tens or hundreds of thousands of dollars in settlements have won millions of dollars in trials.<sup>15</sup> Tried cases may return substantially more than settled cases.<sup>16</sup>

Trial victories motivate defendants to settle, but they can also create allocation problems, problems insolvencies among asbestos manufacturers have brought to the fore. If a small number of plaintiffs with enormous jury verdicts were paid in full, other plaintiffs might receive next to nothing, perhaps even less than they would have recovered had the trials turned out less favorably. Trial victories may cause a defendant to be more generous on the whole, but not all plaintiffs may benefit from a larger gross payment on a block of claims.

For example, suppose a defendant would offer \$50 million to settle a block of one thousand asbestos claims. Now suppose that a plaintiffs' attorney decides to exert greater pressure on the defendant by trying five claims. The trials turn out well and the five plaintiffs win \$50 million. While the verdicts are on appeal, the defendant offers \$80 million to settle the group. The strategy of increasing the pressure has paid off, generating a \$30 million increase in the size of the fund. Yet, if the five victorious plaintiffs were paid the full \$50 million on their jury verdicts, the remaining 995 claimants would have to share only \$30 million. Assuming that the five victorious claimants would have received less than \$20 million out of the original \$50 million offer, the \$80 million settlement would necessarily leave some of the remaining claimants worse off. To achieve a Pareto improvement, the five victorious plaintiffs would have to accept amounts below their verdicts when settling.<sup>17</sup>

Because jury awards in asbestos cases may exceed settlement payments by far, the process of selecting cases for trial also raises concerns. Suppose a lawyer has one thousand clients with asbestos claims against a recalcitrant defendant. Now suppose a trial setting opens up and the lawyer wants to use it to generate pressure to settle. By standing order of the court, the lawyer can select any five claimants with pending cases and try them. The five

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15. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii fig.S.1 (1984) (comparing returns in tried and settled asbestos cases). Settlement discounts occur in many kinds of lawsuits. See, e.g., Stephen J. Spurr & Walter O. Simmons, *Medical Malpractice in Michigan: An Economic Analysis* 21 J. HEALTH POL. POL'Y & L. 315, 316 (1996) (finding that medical malpractice cases settle for "approximately 16 to 20 percent less . . . than the expected value of . . . claims in litigation").

16. *Id.*

17. Substantial discounts on the jury verdicts might be appropriate, for example, if the verdicts were likely to be reversed or reduced on appeal. The point is not that discounts are wrong, but that discounts must occur to achieve Pareto improvements.

clients chosen will receive one lottery ticket; the 995 clients not chosen will receive another. The lotteries are connected, the outcome of the second varying with the outcome of the first, but the risks and rewards differ enormously. A trial victory could make the five chosen clients rich, while making the remaining clients only somewhat better off (and perhaps even worse off in limited fund contexts). A trial loss would devastate the five chosen clients while harming the remaining 995 clients less significantly.

In my experience, a lawyer in the situation described will look for the best five cases to try, where "best" means having the highest expected value at trial. There is an obvious sense in which these are the cases the lawyer should select. Trying the five best cases will subject the defendant to the maximum amount of settlement pressure, raising the expected value of the entire block of claims to its highest point. However, the remaining 995 clients may not be satisfied knowing this. Each may prefer an opportunity to win big at trial to the option of remaining in the pack, even while acknowledging that another's case is superior.<sup>18</sup>

The possibility that a lawyer's judgment concerning the order of trying claims may conflict with a client's wishes materialized in the Bendectin litigation. Discussing the case of Betty Mekdeci, the first Bendectin plaintiff to go to trial, Professor Howard Erichson writes:

After the first jury found against her, a new trial was granted on appeal. Mekdeci's lawyers considered her case more problematic than some others, and wanted to postpone the retrial to allow other cases to go to trial first. When Mekdeci refused to postpone her trial, the lawyers unsuccessfully tried to withdraw from representing her.<sup>19</sup>

Erichson then reports the judgment of Professor Richard Marcus that "Mekdeci's case provides some reason for feeling that client desires may legitimately be conditioned on the 'greater good' of the overall plaintiff

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18. Obviously, this statement assumes that clients know about their own claims and others'. In an interesting paper on class actions, Geoffrey Miller proposes a Rawlsian approach to handling conflicts that assumes ignorance of claimant-specific information. On Miller's approach, "a conflict of interest should be deemed impermissible if a reasonable plaintiff, operating under a veil of ignorance as to his or her role in the class, would refuse consent to the arrangement." Geoffrey Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard 2* (2003) (unpublished article on file with the author). Essentially, this is a "reasonable plaintiff" standard, the merit of which is that decisions on conflicts would be made in a rational and risk neutral way with the object of maximizing the expected value of claims. *Id.* at 11-12. The thrust of this article is similar. In consensual group lawsuits, strategy choices that are reasonably predicted to maximize aggregate claim values are normatively proper and desirable even when they involve inter-client tradeoffs like the one discussed in the text.

19. Erichson, *supra* note 9, at 30 n.132 (citing *Mekdeci v. Merrell Nat'l Lab.*, 711 F.2d 1510, 1516 (11th Cir. 1983); MICHAEL GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996)).



group in some litigations involving multiple claimants.”<sup>20</sup> Erichson endorses this assessment.<sup>21</sup>

I agree that the good of all may reasonably come before the good of any. However, my point here is the weaker descriptive one that, in group lawsuits, trial verdicts and strategic litigation decisions relating to them can create inter-client conflicts even when everyone agrees on the aggregate value-maximizing choice. The process of maximizing the value of a group of claims need not be conflict-free. The example involving Mekdeci makes this clear.

Maximization strategies can also affect allocations when claims are expected to settle and when defendants care little about the manner in which settlement dollars are deployed. Suppose cash flow considerations lead an asbestos defendant to agree to pay one hundred cases at pre-set values every six months, with the intent of resolving a plaintiff’s attorney’s inventory of one thousand cases over five years. Now assume that all claimants with the same diseases are to be paid the same amount, with no adjustment for delay. Rationally, every claimant would want to be in the first settlement group, a dollar received today being worth more than a dollar received in the future. But only one hundred claimants can be in the first group; some payments must be delayed. The staggered settlement may maximize the total payout (even when delay is accounted for), but plaintiffs with late-processed claims may have a grievance.

In principle, a cash flow deal can leave open all possible orders of processing claims. In the example, claims one through one hundred could be processed first. So could claims 900 through 1000 and all other combinations of one hundred claims. The decision to negotiate a cash flow deal, therefore, need not place any particular client behind any other in the payment queue. It does require the lawyer to order the clients at some point, however, and therein lays the difficulty. Some clients must be paid last, and they might have preferred a different settlement that would have yielded less money but paid them sooner.

For example, suppose the cash flow deal had a net present value of \$100 million and that the one thousandth Client would have received \$10,000 in year five. Now suppose the plaintiffs’ attorney had a second option:<sup>22</sup> force the defendant into involuntary bankruptcy. Assume that, had the second option been chosen, Client 1000 would have received \$8,000 in year three. If Client 1000 has a high discount rate, payment in year three might be better than payment in year five despite the \$2000 haircut. Client 1000 might prefer the bankruptcy option even if choosing it reduces the net present value of all payments to all claimants to a level below \$100 million. Other clients might reasonably prefer the cash flow deal.

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20. Erichson, *supra* note 9, at 30 n.132 (quoting Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 252-53 (1997)).

21. *Id.* at 32 (“Given a situation in which any decision favors some clients’ interests over others, the sounder ethical course for the lawyer is to advance the overall interests of the group.”).

22. Robert L. Dunn & Everett P. Harry, *Modeling and Discounting Future Damages*, 193 J. OF ACCOUNTANCY 4955 (2002), available at 2002 WL11221538.

Using an interest rate factor to inflate delayed payments would ease this maximization conflict but not necessarily eliminate it. To see this, one need only ask how large the factor would have to be. Discount rates are highly subjective and hard to discover without actual choices. A lawyer negotiating a cash flow settlement would have little chance of setting interest rates so that all clients were indifferent as to the year in which they were paid.

The growing number of asbestos bankruptcies has brought another maximization conflict to the fore, namely, the allocation of insolvency risks. In the cash flow deal, clients paid in year five bore the greatest risk that the defendant would run out of money before paying them. Rather than bear this risk, they might have preferred a much smaller settlement in which all clients were paid in six months. One could compensate them for the insolvency risk by increasing their payments, but this too would be hard to do in the absence of hard information about the likelihood of bankruptcy and the clients' tolerances for risk.

Human psychology may also place strings on settlement dollars. Suppose an asbestos lawyer has an opportunity to add one thousand pleural disease cases to an existing client mix and that the expected gain on the new cases is \$250 per case. In other words, the lawyer expects to be able to give each new client a net settlement payment of \$250 after deducting fees and costs.

In theory, a decision to accept the one thousand new cases could benefit both the new clients and the old ones. The larger group might realize economies of scale that the smaller groups could not separately achieve. However, suppose that clients with pleural disease simply will not accept \$250 payments, even when told this is the expected value of their claims. They will always go to trial unless offered at least \$500 because, at lower recovery levels, they are risk-preferring. Unfortunately, trials cost far more than settlements, and trying the new cases would more than erase the economies of scale.

On these assumptions, adding the new cases to the existing ones would increase the size of the pie but would also create allocation problems. To take advantage of the scale economies without risking an expensive trial, the settlement would have to give the new clients at least \$500 each, twice what their claims generate in net payments. In effect, the price of the scale economies would be a wealth transfer from the existing clients to the new ones.

Prospect Theory, a behavioral approach to human decision making pioneered by Daniel Kahneman and Amos Tversky, suggests that pleural disease claimants may be risk-preferring. "Kahneman and Tversky have found that individuals make risk-seeking choices when selecting between [low-probability] gains. . . . Thus, individuals generally prefer a 5 percent

chance at a \$1,000 prize to a certain \$50 prize.”<sup>23</sup> Pleural disease claimants fit this description. They may gamble for the same reason many people buy lottery tickets. The cost of going to trial—a missed opportunity to settle for a small sum—is too low to make a real difference in their lives, but the potential payoff from winning at trial or from bargaining exceptionally hard may be large enough to matter.

Attitudes toward risk flip when, to gamble, one must wager a large guaranteed gain. “[I]ndividuals make risk-averse choices when selecting between [moderate-to-high probability] gains. . . . Thus, individuals generally prefer a certain \$500 prize to a 50 percent chance at a \$1,000 prize.”<sup>24</sup> Mesothelioma victims, asbestosis victims, and others with high value claims are in this position. To go to trial, they must be willing to reject settlement offers worth thousands or millions of dollars. Prospect Theory suggests they will not take this risk, even when the odds of winning favor them.<sup>25</sup> Risk aversion will cause them to settle for considerably less than the expected value of their claims.

When a litigation group containing risk-averse persons with large claims and risk-preferring persons with small claims settles, the weak may beggar the strong. Clients with low value claims may receive too much because they are willing to gamble on trials, and clients with high value claims may receive too little because they are not. The combination of risk tolerances creates an environment in which wealth transfers are likely even if plaintiffs’ attorneys do not set out to make them. The simple desire to allocate funds according to clients’ wishes may generate wealth transfers naturally.

### *B. Maximization Conflicts Hidden in Stepwise Progressions*

In State One, Clients A, B, and C expect recoveries of \$100 apiece. In State Two, A and B expect \$100, and C expects \$150. In State Three, all three clients expect \$120 apiece. Plainly, States Two and Three are Pareto-superior to State One, meaning that a move from State One to either alternative would make at least one client better off without harming anyone. But neither State Two nor State Three is Pareto-superior to the other. A move from State Two to State Three would cost Client C \$30. A move from State Three to State Two would cost Clients A and B \$20 each. States Two and Three are Pareto non-comparable even though State Three obtains the largest total recovery (\$360 > \$350 > \$300).

Suppose a lawyer representing all three clients can move them from State One to State Three but can get there only via State Two. Consider an example. At step one, the lawyer commissions a study of the etiology of asbestos diseases. The study shows that Client C has an especially strong claim but has no impact on the claims of Clients A or B. The first study thus

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23. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 166-67 (2000).

24. *Id.* at 167.

25. *Id.*

moves the group from State One to State Two. Now suppose the lawyer commissions a second study. It strengthens the claims of A and B but marginally weakens the claim of C. The second study thus moves the group from State Two to State Three. By undertaking the second study, the lawyer increased the total return to the group but made Client C worse off.

In this example, is the maximization process harmonious? Not entirely. The stopping point (State Three) is Pareto-superior to the starting point (State One), but not to the way station (State Two). If asked at the start of the case whether they preferred a move to State Three, the clients would unanimously affirm. But the vote would not be unanimous if the clients were asked the same question while in State Two.

This example raises interesting questions about the duty of loyalty. Did the lawyer act to the detriment of Client C by commissioning the second study? Or was the decision acceptable because State Three was Pareto-superior to State One? The answer depends on whether one uses State One or State Two as the benchmark when evaluating the decision to fund the second study. If the duty prohibits a lawyer from doing anything that makes a client worse off than the client was at the beginning, the decision to go ahead with the second study is fine. If the duty prohibits a lawyer from doing anything that makes a client worse off than the client would otherwise have been, the decision constitutes a breach.

Lawyers frequently deploy strategies that move clients between Pareto non-comparable states when developing groups of claims. Because the costs and benefits of litigation services are not perfectly correlated, these steps are inevitable. Clients sometimes pay for services that benefit others and sometimes gain from services for which others pay. For example, in an asbestos case, scientific evidence showing that pleural disease worsens over time would help pleural victims by strengthening their claims to compensation. But it would not help mesothelioma victims, mesothelioma being a fatal disease that often kills within months of being diagnosed. If the cost of acquiring this evidence were divided among all claimants, mesothelioma victims would be worse off. They might make up for more than lost ground, however, as other evidence comes in that mainly benefits them. The point is not that mesothelioma victims (or other claimants) wind up worse off than they begin; it is that progress from a Pareto-inferior starting point to a Pareto-superior ending point often involves Pareto non-comparable steps.

### *C. Interim Conclusion*

In some respects, the process of maximizing claim values resembles that of maximizing the value of corporate assets. Plaintiffs (shareholders) hire lawyers (managers), give them claims (assets) to oversee, and use contingent fees (salaries, bonuses, stock, options, etc.) to encourage them to produce

good results. The process appears to be harmonious because all plaintiffs (shareholders) benefit when the value of claims (assets) increases.

There are, however, important differences between the two ventures. Holders of common shares can sell when they want. Plaintiffs cannot. Consequently, shareholders can protect themselves from maximization conflicts better than plaintiffs. When managers incur excessive risks, shareholders can move their money into more conservative investments. When managers are too conservative, they can do the reverse. When managers pass up short run opportunities in favor of long run profits, shareholders with high discount rates can sell and investors with low discount rates can move in. Plaintiffs, by contrast, have little recourse in these situations. Basically, they hang on until their cases come up for trial or settlement offers arrive.<sup>26</sup>

Shareholders also enjoy more transparency than plaintiffs. The market produces lots of information about public companies, and the importance of information is quickly evaluated by traders and reflected in prices. Plaintiffs know less about their agents' day-to-day operations and cannot easily gauge the importance of litigation events and decisions.

Finally, shareholders can limit their investments in particular companies and diversify risks. Plaintiffs, especially those with large claims, cannot diversify as easily. Consequently, their fortunes turn more greatly on particular agents' decisions.

For all these reasons, maximization conflicts can matter greatly to claimants. This is true whether claimants are involved in class actions or consensual group lawsuits. As Professor Coffee explained when discussing class actions:

[T]he standard conflict everyone points to first is what I will call internal conflicts. Internal conflicts involve people who have suffered very different injuries that can't be reliably measured. . . . [I]f we are dealing with people who have a deadly injury—they're dying of some kind of rare cancer caused by asbestos, or have just been exposed and have mental injury and are suffering and are at risk for future injury—it is not possible to come to any kind of collective sense of what these injuries are. They are highly variant. Once we have high variance within the class, we are going to have very different attitudes towards what people want, what kind of recovery, what kind of schedule to recoveries.<sup>27</sup>

Had one not known that Coffee's subject was the class action, one would have thought he was discussing mass asbestos lawsuits instead. There have been few asbestos class actions, and the source of Coffee's "internal

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26. In this respect, signed asbestos clients often resemble class members. See, e.g., Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1446 (1997) (highlighting the passive role of class members, as well as their lack of information and authority).

27. Coffee, *supra* note 1, at 344.

conflicts” is the nature of the injuries alleged, not the procedural vehicle used to process claims.<sup>28</sup> If class counsel must move ahead despite these “internal conflicts,” attorneys representing groups of signed asbestos clients must do so as well.

This reality establishes that agency law and state bar rules tolerate conflicts to significant degrees. The conflicts described in this section are important, but neither body of law recognizes them or requires lawyers to obtain conflict waivers because of them. The prevailing view is that the project of maximizing claim values is a harmonious one in which a plaintiffs’ attorney can give multiple clients unqualified loyalty simultaneously. This overstatement contains a large element of truth: clients normally prefer more money to less, and most are well served by attorneys’ efforts to increase aggregate recoveries.<sup>29</sup> But it also sweeps some important differences under the rug. Even though claim maximization is a promising area for the application of traditional agency principles and state bar rules, it often requires a lawyer for a plaintiff group to incur and resolve many conflicts without express client consent.<sup>30</sup>

### III. ALLOCATION CONFLICTS

In an article on class actions, Professor Bruce Hay points out that a level contingent percentage fee arrangement—one on which every claimant pays the same fraction of the gross recovery in fees—may encourage a plaintiff’s lawyer to maximize the recovery on a group of claims but does not motivate a lawyer to allocate the recovery correctly (or incorrectly).<sup>31</sup> The lawyer is indifferent to all possible allocations among the claimants because, on all possible allocations, the fee remains the same.<sup>32</sup>

Indifference may not imply a lack of bias in practice, however, as Professor Hay shows. Suppose a class contains two members, A and B, with A’s claim being worth twice as much as B’s. Now suppose the class action settles for \$90. The allocation that reflects the relative value of the claims is \$60 to \$30. However, class counsel is indifferent between all possible allocations between A and B, the allocation not affecting the fee, and decides to determine the actual allocation by lottery. Counsel writes all possible divisions of \$90, ranging from (\$90, \$0) to (\$0, \$90) on slips of paper, places them in a box, shakes well, and draws one out. The expected result (the average payment over repeated lotteries with replacement) is

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28. *Id.*

29. *Id.* at 343.

30. *Id.* at 341 (stating that in a large class, it is not possible to get the individual consent of each member).

31. Hay, *supra* note 26, at 1470-72.

32. *Id.* at 1440.

(\$45, \$45), i.e., an equal division. The random allocation undervalues the larger claim and overvalues the smaller one.

One cannot remedy this problem by giving the lawyer a bonus for payments to A. Suppose the lawyer receives a ten percent contingent fee on payments to B and an eleven percent fee on payments to A. Now the lawyer's incentive is to give all the money to A. The (\$90, \$0) allocation yields a larger fee than any other allocation, with the smallest fee coming at (\$0, \$90).

Professor Hay's analysis resembles Professor Coffee's in that it applies to mass tort lawyers as well as class counsel.<sup>33</sup> Asbestos lawyers represent hundreds or thousands of clients whose claims differ enormously in value.<sup>34</sup> Clients with mesothelioma have large claims; clients with pleural disease have small claims. In typical group representations, all clients pay the same percentage fees. Consequently, the clients' common attorney should be economically indifferent among all possible allocations.<sup>35</sup> The upside of this is that the lawyer has no incentive to prefer any claimant to any other.<sup>36</sup> The downside is that if lawyers chose allocation formulas at random, pleural disease claimants will receive too much money and mesothelioma victims will receive too little.

By themselves, then, level contingent fee arrangements do not solve allocation problems. Other safeguards must be brought to bear if claimants are to receive appropriate payments. The number of candidates is limited. In class actions, they include lawyers' character, judicial monitoring, objections from class members (or their lawyers), and opt out rights.<sup>37</sup> In consensual group lawsuits, they include character, complaints from clients (and referring lawyers), settlement refusals, discharge, and malpractice suits. Plainly, these safeguards have important effects. Settlement distributions in class actions and mass actions differ markedly from random distributions. Claimants with serious injuries and strong cases almost always receive more money than claimants with minor injuries and weak cases. Dollars are not allocated perfectly and some averaging of damages occurs, but there are clear patterns reflecting the size and strength of claims, not random results.<sup>38</sup>

For present purposes, the tightness of the correlation between settlement payments and claim values is not of primary concern. Of greater interest is the inevitability of allocations and the role(s) plaintiffs' attorneys play in their creation. Suppose, as in the preceding example, the defendant offers a \$90 lump sum settlement and the attorney for A and B recommends a (\$60, \$30) distribution that reflects the relative values of the clients' claims. Did the attorney breach a duty to either client by making the recommendation?

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33. See generally Coffee, *supra* note 1; Hay, *supra* note 26.

34. See Coffee, *supra* note 1, at 344 (discussing variant injuries and claimants).

35. See Hay, *supra* note 26, at 1471.

36. *Id.*

37. For excellent discussions of opt out rights and other protections, see Richard Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002).

38. Damages averaging occurs when factors that would affect jury awards at trial are ignored in settlement. Equal payments for all claimants result when all such factors are ignored.

The argument for an affirmative answer is straightforward. A and B have conflicting interests in the settlement fund. A 60-30 split is worse for A than a 70-20 split and worse for B than a 50-40 split. A most prefers a (\$90, \$0) allocation and B most prefers a (\$0, \$90) division. Even though the proposed (\$60, \$30) allocation reflects relative claim values, it sacrifices the interests of each client for the benefit of the other, seemingly in violation of the duty of loyalty.

The fairness of the (\$60, \$30) split may not nullify the violation. Suppose it is true that A and B would have won \$60 and \$30 (or less), respectively, had they sued alone. They would then be unable to show that the (\$60, \$30) division harmed them. Under traditional principles of agency law, this would doom their complaints. Nowadays, though, harm is not always a required element of a disloyalty complaint. The *Restatement (Third) of the Law Governing Lawyers* and other precedents make remedies available, including fee forfeiture, for harmless acts of disloyalty.<sup>39</sup>

Recent developments notwithstanding, it is far from clear that a lawyer violates the duty of loyalty by recommending a settlement allocation. The aggregate settlement rule places no limit on a lawyer's involvement in an allocation plan. If anything, it presupposes that a lawyer will recommend such a plan or accede to a plan recommended by a defendant or third party, before making the disclosures the rule requires.

Nor does other authority unambiguously forbid a lawyer from proposing an allocation. Suppose a lawyer represents several clients injured in an automobile accident. If the defendant's insurer offers the policy limits in settlement of the clients' claims, may the lawyer suggest a division? The answer should be clear, automobile accidents having been the mainstay of the typical personal injury lawyer's practice for decades, but it is not.

A 1997 North Carolina advisory opinion allows a lawyer to recommend a settlement allocation:

"[A] lawyer may determine that he or she will be able to facilitate an acceptable division of the insurance proceeds among the multiple claimants without advocating against the interests of any of the claimants. . . . If an offer of settlement is made, the lawyer may facilitate mediation among the claimants to determine how the offer will be divided. Alternatively, the claimants may agree to accept the recommendation of the lawyer with regard to an equitable division of the settlement offer."<sup>[40]</sup> The opinion equivocates, however, stating that "[t]he lawyer may make such a

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39. See Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POLY REV. 323, 347 n.93, 348-49 (2001).

40. N.C. State. Bar, Ethics. Op. RPC 251, 1997 WL 331718 (1997) [hereinafter North Carolina Ethics Opinion].



recommendation only if the lawyer can do so impartially. The lawyer must withdraw from the representation of all of the claimants if the lawyer is placed in the role of advocate for one or more of the claimants as against the other claimants.”<sup>41</sup>

Where impartiality ends and advocacy begins the opinion does not say.

A 2000 Oregon advisory opinion comes out squarely against a lawyer’s involvement.

When resources are insufficient to cover all of the clients’ damages, the lawyer would have an “actual conflict of interest” if the lawyer attempted to negotiate or otherwise resolve the distribution of proceeds among the clients. Such a distribution could be accomplished through a mediation or arbitration process established by the lawyer. However, the lawyer cannot actively participate in that process, other than referring the clients to the mediator or arbitrator.<sup>42</sup>

In Oregon, a lawyer who suggests a division of a settlement fund appears to commit a *per se* violation of the conflict rules.<sup>43</sup>

The conflict between the North Carolina and Oregon opinions is noteworthy. Both opinions were issued at the end of the 20th century, by which time lawyers had litigated and settled hundreds of thousands or millions of multi-client automobile cases. Even so, the opinions disagree about the lawyer’s proper role. One allows a lawyer to help the clients divide a lump sum; the other does not. If state bar ethics committees cannot agree on the proper course in two-client auto cases, what hope have they of reaching a reasoned consensus on lawyers’ professional responsibilities in mass tort cases that involve enormous client groups?

To my mind, neither the Oregon opinion nor the North Carolina opinion gets the automobile case right. Oregon’s blanket prohibition denies clients valuable information about claim values that lawyers normally provide.<sup>44</sup> It forces clients to pay for information a second time (e.g., by hiring a mediator) or to do without it. Neither option is self-evidently better than asking the clients’ joint lawyer for help, especially if and when the lawyer has no stake in the division. Clients can waive most conflicts. There is no obvious reason to forbid them from waiving this one.

The North Carolina opinion asserts that no conflict exists when a lawyer makes an impartial recommendation.<sup>45</sup> This is incorrect. Clients typically prefer more money to less. Consequently, when settlements funds are limited (as they always are), all recommendations embody compromises of

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41. *Id.*

42. Or. State. Bar Ass’n, Ethics Op. 2000-158, 2000 WL 260595 (2000) [hereinafter Oregon Ethics Opinion].

43. *Id.*

44. Oregon Ethics Opinion, *supra* note 42.

45. North Carolina Ethics Opinion, *supra* note 40.

clients' competing interests, including recommendations that are impartial, reasonable, or otherwise good. Good recommendations may be possible in all conflict situations, yet lawyers cannot make them without obtaining waivers.

The right answer is that lawyers always incur conflicts when recommending settlement allocations, but that lawyers should always be able to offer recommendations that are preceded or accompanied by appropriate disclosures. The *Restatement (Third) of the Law Governing Lawyers* seems to agree.

Lawyer represents A and B, pedestrians struck by an automobile as they stood at a street corner. Each has sued C, the owner-driver, for \$150,000. C has \$100,000 in liability insurance coverage and no other assets with which to satisfy a judgment. Neither A nor B can be paid the full amount of their claims and any sum recovered by one will reduce the assets available to pay the other's claim. Because of the conflict of interest, Lawyer can continue to represent both A and B only with the informed consent of each.<sup>46</sup>

The example assumes the lawyer will play a role in the settlement process, where more for one client means less for the other. If the lawyer's engagement were limited to maximizing the recovery, no conflict would exist, A and B having a common interest in getting the largest possible part of C's insurance coverage.

The *Restatement's* position rests on an agency foundation.<sup>47</sup> A lawyer must obtain an informed conflict waiver before designing a settlement allocation because an agent may not incur a conflict without a principal's permission. Yet, resorting to agency in this particular context is, as Professor Coffee put it, "stuffing the square peg into the round hole."<sup>48</sup> A waiver cannot eliminate, or even ameliorate, the need to compromise clients' competing interests when allocating limited funds. It cannot free a lawyer from having to make a contestable professional judgment. A waiver can only establish a client's awareness and willingness to allow a lawyer to proceed, apparently with the expectation that the lawyer will act reasonably.

In effect, an advance waiver of an allocation conflict converts a lawyer from an agent into a trustee. Trustees are fiduciaries, yet trustees make allocation decisions frequently. They use trust dollars to pay for Johnny's education, knowing that fewer dollars will remain to buy Susie a new house. "Trustees can make these [inter-beneficiary] tradeoffs even though the law requires them to treat beneficiaries impartially. Impartiality permits trustees

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46. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 128 cmt. d(i), illus. 1 (2000).

47. *Id.*

48. Coffee, *supra* note 1, at 341.

to balance beneficiaries' interests as long as their decisions have reasonable grounds."<sup>49</sup>

The North Carolina advisory opinion perceives the role change but does not fully embrace it. It allows the lawyer to recommend an allocation "if the lawyer can do so impartially," but it draws the line when the lawyer "advocate[s] for one or more of the claimants as against the other claimants." When donning the trustee hat, however, the lawyer must remove the agent hat. To recommend any allocation, a lawyer must advocate a judgment about the clients' shares. The recommendation may be impartial (in the sense of not being intentionally biased) and the advocacy reasonable, but the lawyer must deviate from the agency standard of unqualified loyalty.

To recognize the role change and embrace it is to be service-oriented and client-focused, not unprofessional. By maximizing claim values and recommending allocations, lawyers perform valuable services. Often, these services involve inter-client trade-offs or accommodations.<sup>50</sup> Consequently, they do not neatly fit the model of agency law. To use this as a reason to condemn the services or the lawyers who provide them would be wrong, however. The point of group representations (and other collective actions) is to help participants, not to conform to a stereotype of lawyer-client relationships.

Lawyers' willingness to make inter-client trade-offs when representing groups may clash with agency-based understandings of professionalism, but what must be understood is that, in mass representations, agency has a limited role to play. Group representations are collective actions run for the good of all. Participants' fates intertwine, as each plaintiff depends on others to cooperate and abide by rules.<sup>51</sup> This cooperation involves the sacrifice of opportunities for personal gain, as collective actions typically do.<sup>52</sup> These sacrifices are predictable and beneficial responses to structural features of group litigation.<sup>53</sup> They are good because, without them, litigation groups would have less chance of succeeding.

#### IV. GROUP DECISION MAKING

Departures from classic agency are clearest when clients in litigation groups adopt majoritarian voting rules. A classic example can be found in *Hayes v. Eagle-Picher Industries, Inc.*,<sup>54</sup> where the claimants established

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49. Silver & Baker, *supra* note 7, at 1510 (citing authority).

50. *Id.* at 1468-69.

51. *Id.*

52. The economic logic of collective action dooms players who avail themselves of all opportunities to profit, but enables players to obtain superior outcomes by binding themselves to cooperate. See RUSSELL HARDIN, *COLLECTIVE ACTION*, 20-30 (1982) (explaining that collective action is an in-person Prisoner's Dilemma in which individually rational behavior generates outcomes that are collectively inferior).

53. *Id.*

54. 513 F.2d 892 (10th Cir. 1975). I discuss this case at length in Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

that the decision to settle as a group would be made by majority rule.<sup>55</sup> Departures also occur when clients delegate control of important decisions to others. In *Abbott v. Kidder Peabody & Co., Inc.*,<sup>56</sup> a securities lawsuit involving more than 200 investors, the plaintiffs signed a Representation Contract that established a “steering committee” to function as the lead plaintiff.<sup>57</sup> Each client authorized the lawyer to follow the steering committee’s lead when conducting his or her case.<sup>58</sup> Each client also agreed to allow the lawyer to communicate with the steering committee in lieu of communicating with each client directly.<sup>59</sup> The clients selected the steering committee’s members by majority rule, with each client having a number of votes reflecting the size of his investment.<sup>60</sup> The contract also contained a “Settlement and Sharing of Proceeds” provision that (1) authorized the lawyer to settle the claims of clients not on the steering committee on the same terms as steering committee members received, (2) provided that any settlement monies received by any client would be shared by the entire plaintiff group, (3) established a formula for apportioning settlement funds that reflected the size of each client’s investment, and (4) gave the steering committee the power to alter the formula and to enforce its will by penalizing clients who, after joining the group, attempted to settle separately.<sup>61</sup>

These provisions had obvious purposes: to provide a governance structure for collective action and to encourage cooperation so the collective action would succeed. All joint undertakings require provisions like these. Whenever principals join forces in pursuit of economic gain, costs must be borne; decisions binding on all must be made; agents must be hired, given incentives, and monitored; and returns must be allocated. The normal way to address these needs is contractually.

Ordinarily, the law respects contractual commitments by partners in joint undertakings to limit their control of decisions.<sup>62</sup> It even allows principals to renounce control entirely by becoming limited partners or passive investors of other sorts. It does not force principals to adhere to a normative vision of agency, but leaves them free to establish principal-agent relationships that suit their needs best.

Laissez faire, however, does not prevail in matters of professional responsibility. In both *Hayes* and *Abbott*, judges objected to constraints on clients’ individual control of decisions and refused to allow litigation to

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55. *Hayes*, 513 F.2d at 892.

56. 42 F. Supp. 2d 1046 (D. Colo. 1999).

57. *Id.* at 1048.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1048-49.

62. See *Silver & Baker*, *supra* note 1, at 1502-03.

proceed under restrictive agreements.<sup>63</sup> In *Hayes*, the lawyer for the plaintiff group consummated a settlement that a majority of the clients approved but that a minority opposed.<sup>64</sup> When two clients challenged the settlement on appeal, the lawyer defended it by arguing that the disaffected clients had agreed to be bound by majority rule.<sup>65</sup> The appellate court invalidated the settlement and found that the lawyer acted improperly.<sup>66</sup> In its view, “the basic fundamentals of the attorney-client relationship” prevented the lawyer from entering into a settlement to which any client objected.<sup>67</sup> The majority rule agreement meant nothing because the clients did not know the terms of the actual settlement when they entered into it.<sup>68</sup>

In *Abbott*, the court faced an opposite but related problem. The defendant objected to the governance structure the plaintiffs created for themselves on the ground that it *prevented* individual plaintiffs from settling unless the steering committee went along.<sup>69</sup> They asked the court to invalidate the representation contract and disqualify the plaintiffs’ attorney.<sup>70</sup> The court left the contract standing but granted the motion to disqualify.<sup>71</sup> The clients were free to do as they pleased, it reasoned, but the lawyer was not.<sup>72</sup> In the court’s judgment, Colorado’s conflict rule prohibited the lawyer from continuing to represent the clients pursuant to the representation contract.<sup>73</sup>

To reach this conclusion, the court reasoned as follows: First, because the client group was not a legal entity, the attorney represented each client individually.<sup>74</sup> The “basic fundamentals of the attorney-client relationship” remarked on in *Hayes* therefore applied to the lawyer’s relationship with each client.<sup>75</sup> Second, the representation agreement created a conflict by empowering a minority of the clients on the steering committee to tell a majority what to do.<sup>76</sup> This was “far worse” than the arrangement criticized in *Hayes*, which allowed a majority to control a minority.<sup>77</sup> Third, in derogation of the public policy of Colorado, the representation agreement allowed the lawyer to negotiate a settlement without advising the clients

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63. See *Abbott*, 42 F. Supp. 2d at 1051 (applying Colorado law) (“[A]ny provision of an attorney-client agreement which deprives a client of the right to control their case is void as against public policy.”); *Hayes*, 513 F.2d at 894-95 (“[A]llowing the majority to govern the rights of the minority is violative of the basic tenets of the attorney-client relationship.”).

64. *Hayes*, 513 F.2d at 893.

65. *Id.* at 894-95.

66. *Id.* at 894.

67. *Id.*

68. *Id.*

69. *Abbott*, 42 F. Supp. 2d at 1049.

70. *Id.*

71. *Id.* at 1050-51.

72. *Id.*

73. *Id.*

74. *Id.* at 1050.

75. *Id.* at 1051.

76. *Id.*

77. *Id.*

individually and without obtaining individual authority to settle.<sup>78</sup> For these reasons, the court believed, the lawyer should “have advised [the clients] against entering into the Representation Contract because the agreement violates the professional and ethical standards created to regulate the legal profession in the State of Colorado. Further, valid client consent to waive the potential conflict of interest cannot be obtained under the circumstances.”<sup>79</sup>

Plainly, in both *Hayes* and *Abbott*, judges forced round pegs into square holes. Instead of allowing clients to create working relationships with each other and with lawyers that met the distinctive needs of joint representations, they required all attorney-client relationships to conform to a Platonic ideal. Their reasons for doing so are transparently defective. Agency law gives principals and agents complete freedom to modify its default provisions. It even allows them to create relationships that have the form of agency but not the substance. These arrangements, formally called powers given as security, are especially useful when principals must commit in advance to cooperate in settings where incentives to defect may be strong.<sup>80</sup> Group lawsuits present precisely this problem of pre-commitment, as *Hayes* and *Abbott* show. In *Hayes*, a small number of clients wanted to continue litigating even though most did not.<sup>81</sup> In *Abbott*, the defendants wanted to reduce the group’s settlement leverage by negotiating with plaintiffs individually.<sup>82</sup> Both phenomena are predictable problems that cooperating plaintiffs and their attorneys reasonably wish to deal with in advance.

The *Abbott* opinion is particularly disturbing, I believe, because the clients who signed the representation agreement were investors.<sup>83</sup> One often hears that clients with personal injuries require a degree of paternalistic protection, but investors—especially 200 of them—have access to the entire legal market and are fully capable of figuring out where their interests lie. The idea of using state bar rules to protect sophisticated clients from themselves is a perversion that can harm clients, but is unlikely to help them.

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78. *Id.*

79. *Id.*

80. The points in this paragraph are fully documented and explained in a series of articles Lynn Baker and I have written on aggregate settlements and group representations. See Charles Silver and Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997); Charles Silver and Lynn A. Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998); Lynn A. Baker and Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227 (1999).

81. See *Hayes*, 513 F.2d at 892-893.

82. See *Abbott*, 42 F. Supp. 2d at 1049.

83. *Id.* at 1048.

## V. CONCLUSION

Group representations are complicated, expensive, and risky undertakings entered into for mutual (usually economic) gain. One should expect their forms and governance structures to be as diverse as those that govern partnerships, corporations, and other joint ventures. One should not expect lawyers' roles in all group representations to be the same. Some attorney-client relationships may give clients extensive control. Others may narrow clients' rights and give lawyers considerable independence. No arrangement is inherently right or inherently wrong. State bar rules that saddle all lawyers with identical duties harm mass tort clients and others who are jointly represented by preventing them from using legal relationships that best suit their needs.